BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF LEWIS COUNTY PUBLIC WORKS DEPARTMENT Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 80-143 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $2,500 civil penalty assessed for an alleged violation of RCW 90.48.080 of the Water Pollution Control Act, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington, Chairman, David Akana, Member, and Marianne Craft Norton, Member, convened at Chehalis, Washington, on December 3, 1980. Hearing Examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230. Appellant objected thereto and moved that the hearing be informal. Following written and oral argument from both counsel, appellant's motion was

denied. State v. Woodward 84 Wn 2nd 329, 525 P. 2d 247 (1974). A formal hearing was conducted.

Appellant appeared by Eugene Butler, Deputy Prosecuting Attorney. Respondent appeared by Charles K. Douthwaite, Assistant Attorney General. Reporter Lois Fairfield recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This case arises in connection with Lewis County's plan for disposal of septage. Septage is the matter, consisting of human waste and water, removed from septic tanks when they are cleaned. Prior to 1974, no plan existed for septage disposal in Lewis County, and the quality of rivers and streams were affected accordingly. In that year the County, in cooperation with state and federal agencies, opened a station where septage could be disposed of for a fee, where it was then composted, and the resulting product sold by the county as fertilizer or soil enricher. This station is known as the Lebo facility, and is located between Chehalis and Centralia.

II

This case involves no flaw in the composing or fertilizer sale process for which the Lebo facility was intended. Rather, this case arises because that process was not used.

The septage receptacle at the Lebo site is a metered tank. The tank temporarily holds the septage, and the meter records the amount

of septage disposed of for the purpose of assessing the fee to the septage hauler. The septage haulers are private concerns engaged in that business. At times pertinent to this appeal, the Lebo facility was attended by a single county watchman who was present only intermittently during weekday business hours depending upon unrelated county duties away from the facility. The principal septage haulers, however, were supplied by the county with keys to the facility to allow access at any time of the day or night. A fence and locked gate denied access to those not allowed on the site by the county.

An unknown septage hauler(s) brought septage to the Lebo facility but bypassed the metered tank (and thus the disposal fee). Driving to another location within the facility they pumped their black, odorous cargo into an open, earthen pit intended for the disposal of kitchen grease (white matter with an odor different from septage). This pumping continued until the pit was overtopped, the end of the pit eroded away, and the escaping septage flowed downhill in a wide black delta. From this, individual streams of septage flowed, ankle deep, into the wetland drainage at the base of the hill and then in large amounts into an unnamed watercourse. This watercourse is some two feet wide and one foot deep at that point but later flows into Coal Creek and the Chehalis River. On the wetland 100 feet above (north of) the watercourse the fecal coliform count (Col./100ml) was 860,000. Moving to where the wetland drains into the unnamed watercourse, the coliform count upstream in the watercourse was only 22 but downstream was 57,000. These are exceptionally high levels of fecal coliform. For comparison, the water quality standard for

the unnamed watercourse is:

> "Fecal coliform organisms shall not exceed a median value of 100 organisms/100 ml, with not more than 10 percent of samples exceeding 200 organisms/100 ml." (Emphasis added.)

WAC 173-201-045(2)(c)(A) and WAC 173-201-070(6).

Fecal coliform are established indicators that disease causing bacteria are present. The waters of Coal Creek and the Chehalis River into which the unnamed watercourse empties are used for stockwater and irrigation purposes, and are bordered by residences.

III

On November 27, 1979, while on routine inspection tour, Department of Ecology (DOE) inspectors visited the Lebo facility. They observed and measured, as stated above, the septage discharge. They also observed sphaerotilus formations in the septage which only form in exposed septage after the passage of weeks or months. From this and the size of the pit, we find that septage was being improperly disposed of into the pit for several weeks or months prior to its escape and subsequent detection by DOE. That the pit contained septage, and not kitchen grease would have been readily apparent to anyone observing the pit or partaking of its odor. This discharge into the watercourse could not have occurred but for the failure of the county to maintain ordinary supervision over its Lebo facility. Such supervision would have prevented this event.

IV

The DOE notified the county of the septage pollution later on the day in question, November 27, 1979. The county immediately began

corrective action. The septage was removed from the pit, and the pit filled in. A containment dike was built downhill. Since the event in question, keys have been called back from septage haulers, a watchman is on duty full time from 7:00 a.m. to 4:30 p.m., five days per week, and grease is now composted.

V

During May, 1980, the county received from DOE a notice citing violation of RCW 90.48.080 and assessing a civil penalty of $2,500 for the foregoing occurrence. From this the county appeals.

VI

Any Conclusions of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The provision at issue, RCW 90.48.080, states:

> Discharge Of Polluting Matter In Waters Prohibited. It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter. (Emphasis added)

Appellant, Lewis County, permitted the discharge in question. This is so because the county invited septage disposal at its Lebo facility, but then failed to maintain ordinary supervision which would have prevented this discharge.

The discharge was into an unnamed watercourse which was a water of this state. "Waters of the state" include all surface waters and watercourses within the jurdisction of the state of Washington. RCW 90.48.020. Thus it is irrelevant whether the unnamed watercourse flows into Coal Creek or any other particular creek.

The discharge caused or tended to cause "pollution" which is defined as:

> Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance in any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agriculture, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life. RCW 90.48.020.

This discharge was or was likely to be detrimental not only to public welfare and beneficial uses, but to human health as well.

We conclude that on November 27, 1979, appellant permitted the discharge of septage into waters of the state causing or tending to cause pollution in violation of RCW 90.48.080.

II

Appellant contends that the penalty in this case should be held void because there is no standard promulgated by the Administrative Code upon which to base such a penalty. We disagree. The state Supreme Court reviewed a similar civil penalty provision under the Clean Air Act, chapter 70.94 RCW, in Yakima County Clean Air Authority

v. Glascarn Builders, Inc. 85 Wash. 2d 255, 534 P. 2d 33 (1975). There, as here, the statute itself provided a maximum daily penalty. Compare RCW 70.94.431 with 90.48.144. There the statute and regulation were challenged as not containing sufficient guidelines for the exercise of authority. The court approved of the civil penalty provision involved noting that, "The penalties must be within normally acceptable limits. This, accompanied by procedural safeguards which control arbitrary and capricious actions, provides a constitutionally permissible delegation." (P 2d at p.34.) The court further observed that, "The discretion as to amount is not significantly different from that exercised traditionally by courts in fixing the amount of fines." (P 2d at p. 37.) We conclude that the penalties provided by the Water Pollution Control Act, RCW 90.48.144, are within normally acceptable limits. Our review and that of the courts on appeal provide procedural safeguards. The penalty in this matter is not void for lack of Administrative Code standards for the amount of penalty.

III

Appellant next contends that the penalty should be held void because DOE has exercised judicial power contrary to the state Constitution. We see no merit in this as the Department of Ecology has only performed an enforcement action to uphold the law it is charged with administering. Appellant has the right of review by both this Board and the Courts, chapter 43.21B RCW.

IV

Appellant further contends that the penalty should be held void because the Department of Ecology failed to provide a hearing prior to

the issuance of the notice of penalty. There is adequate opportunity to be heard in that DOE merely assesses a penalty by notice. There is a right of appeal to this Board and the collection is deferred until after all review proceedings. RCW 90.48.144. There is no deprivation even temporarily without a hearing. See Yakima, supra at P. 2d p. 36 which upheld this procedure against a due process challenge.

V

Appellant finally contends that this hearing must be "informal" as that term is used in chapter 43.21B RCW relating to this Board with consequent de novo judicial review. We disagree. Where, as here, DOE has made a timely election of a "formal" hearing, the hearing is formal with consequent judicial review under RCW 34.04.130 of the Administrative Procedure Act. RCW 43.21B.180 and .230. State v. Woodward 84 Wash. 2d 329, 525 P2d 247 (1974).

VI

Lastly, the Department of Ecology contends that where this Board sustains a violation of this kind, the Board has no authority to alter the amount of penalty assessed by DOE. This is not so. The penalty in this matter is assessed under RCW 90.48.144 which provides for review proceedings before this Board and issuance of a final order confirming the penalty "in whole or in part." Further, since the power exists to affirm a penalty in whole or part it follows that part may be suspended on prescribed conditions. "The power to approve implies the power to disapprove, and the power to disapprove necessarily includes the lesser power to condition an approval." State v. Crown Zellerbach, 92 Wash. 2d 894 (1979). These powers with

regard to penalty review are part of the procedural safeguards spoken of in Yakima, supra, Conclusions of Law II, which justifies delegation of civil penalty authority to DOE.

VII

The penalty assessed in this case, $2,500, is one-half the maximum daily amount provided by RCW 90.48.144. This amount is fully justified in this case by viewing alone the discharge which entered the waters of the state. However, because of the immediate action taken by Lewis County when informed of the discharge, and because of improved supervision which the county has begun at its Lebo facility, this penalty should be mitigated in part, by suspension. The period of this suspension will serve to remind that ownership of an exemplary waste treatment facility is not enough without proper supervision of it.

VIII

Any Findings of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The $2,500 civil penalty is affirmed, provided, however, that one-half of the penalty is suspended on condition that appellant not violate the water pollution control law through or at its Lebo facility for a period of two years from the date of this Order.

DONE at Lacey, Washington, this 13th day of January, 1981.

POLLUTION CONTROL HEARINGS BOARD

Nat W. Washington

NAT W. WASHINGTON, Chairman

David Akana

DAVID AKANA, Member

Marianne Craft Norton

MARIANNE CRAFT NORTON, Member